BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of	)	
	)	
Implementation of Section 304 of the Telecommunications Act of 1996	)	CS Docket No. 97-80
	)	
Commercial Availability of Navigation Devices	)	
	)	
Compatibility Between Cable Systems and Consumer Electronics Equipment	)	PP Docket No. 00-67
	)	

REPLY COMMENTS OF COMCAST CORPORATION

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Comcast Corporation ("Comcast") hereby responds to the comments that were filed in response to the above-captioned Third Further Notice of Proposed Rulemaking ("*Notice*"), which seeks comment on various issues relating to the interrelationships between cable and other MVPD systems and consumer electronics ("CE") devices.[1] The comments provide abundant reasons why the Commission should support the cable industry's efforts to deploy the OpenCable Platform, why it should not and cannot adopt the DCR+ proposal advocated by CEA, and why it should focus its energies on encouraging the development of an "all-MVPD" solution -- while keeping to a minimum further regulatory intrusion into the competitive marketplace.

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[1] *See In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices, Compatibility Between Cable Systems and Consumer Electronics Equipment*, Third Further Notice of Proposed Rulemaking, CS Dkt. No. 97-80, PP Dkt. No. 00-67, FCC 07-120 (rel. June 29, 2007) ("*Notice*").

I. INTRODUCTION AND SUMMARY

Key participants in the first round of comments make several noteworthy points. Samsung and Panasonic confirm that CE manufacturers are pressing ahead rapidly to bring OpenCable Platform-compatible products to market. Cable commenters underscore their firm commitment to support the OpenCable Platform in their headends. MPAA affirms the importance of safeguarding high-value content, and supports the CableLabs process for approving technologies that do so. Microsoft recognizes the need for the Commission to respect the rights of network operators to determine the composition of their services and to make their own technology choices, subject to their willingness to make the necessary technologies available for license to device manufacturers. DirecTV, AT&T, Qwest, and others recognize that the Commission must not prevent service providers from using innovative technologies or providing innovative services, or require reengineering of networks. In varying ways, Intel, Home Networking Proponents, CCIA, Verizon, Microsoft, EchoStar, and Public Knowledge all recognize the need for the Commission to focus on an all-MVPD solution.

But in some cases, drawing lessons from the first-round comments requires reading between the lines, questioning factual representations, and examining hidden agendas. CEA determinedly ignores the burdens that would be imposed on consumers by Commission adoption of its DCR+ proposal, most particularly the frustration and dissatisfaction that will inevitably ensue when they purchase what manufacturers tell them are "cable-ready" devices and then discover that they cannot access all of the services that cable operators make available. Just as with the failed one-way digital cable-ready products that these manufacturers insisted on having the right to produce, these DCR+ devices will disappoint and confuse consumers, failing to accommodate the full range of today's cable services, much less tomorrow's. CEA also vastly understates the burdens that would be imposed on cable operators by DCR+, and overstates the

speed with which DCR+ could be implemented (to hurry matters along, CEA bizarrely requests that the Commission adopt rules *now* that require prompt compliance with standards that even CEA does not expect to be adopted until sometime in *2008*). Those parties who try to dress up their proposals as logically flowing from the *Carterfone* decision and the Part 68 equipment registration program for customer premises equipment -- or the 700 MHz auction rules -- only show that they really don't understand the precedents they seek to invoke.

The Commission should not rush headlong into a decision with tens of billions of dollars of potential consumer and marketplace impact. It needs to study the record and carefully analyze the numerous claims and counterclaims. It also needs to consider the limits of its legal authority, the risks inherent in any interference with the marketplace, and the unfairness and illegality of regulations that arbitrarily treat direct competitors differently. It needs to understand the healthy developments that are occurring throughout the marketplace today, and the losses to consumers that would result if the marketplace were to be distorted by additional regulation. It needs to take into account the damage that could be done by forcing companies to alter business plans to comply with regulations that cannot survive judicial review.

If the Commission takes time to thoroughly and honestly assess the record, and consider all the relevant factors, Comcast submits that the only conclusions the Commission can properly reach are the following:

1. Government interference with the technology plans of MVPDs must be kept to a minimum.

2. The ongoing deployment of the OpenCable Platform must not be impeded.

3. DCR+ must be rejected. And,

4. The Commission should use its good offices to promote the development and deployment of an all-MVPD solution that maximizes the portability of CE devices while minimizing Commission interference with the technology choices and business plans of individual service providers.

II. THE COMMISSION SHOULD ENDORSE THE OPENCABLE PLATFORM AS A MARKET-BASED SOLUTION THAT WILL BENEFIT CONSUMERS.

While there are numerous legal, economic, technological, and policy arguments that need to be taken into account in any decision the Commission makes in this proceeding, the best place to begin is with a focus on the consumer.

In this regard, the key point is the one made by Panasonic: the OpenCable Platform "holds the single best promise for the rapid introduction into the market of full-featured products that can access the same suite of interactive digital cable services as cable operators' lease[d] set-top boxes provide."[2] As multiple commenters explain, with devices built to the OpenCable Platform, consumers can access the full range of cable's interactive services, as well as new applications and services that are yet to be deployed[3] -- in direct contrast to the "frozen-in-time" devices that might be built to CEA's DCR+ proposal.

The comments underscore the strong and widespread support for the OpenCable Platform. As NCTA notes, more than a dozen independent CE manufacturers have signed the OpenCable Platform licenses to manufacture two-way digital cable-ready devices, including leaders in HDTV technology such as Samsung, Panasonic, Toshiba, and LG Electronics,[4] and

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[2] Panasonic Comments at 4. Unless otherwise noted, all references to comments are to those filed in response to the *Notice*.

[3] *See* Comcast Comments at 11; *see also* NCTA Comments at 11-13; Time Warner Cable ("TWC") Comments at 23.

[4] Samsung and LG are the top-ranked manufacturers in the world in global television sales. *See Samsung Retains Lead In Global TV Sales*, Consumer Electronics Daily News (July 16, 2007), *available at* http://www.cedailynews.com/2007/07/samsung-retains.html. Samsung is the world leader in LCD digital televisions sales, and Samsung, LG, and Panasonic have a 70 percent share of plasma digital television sales. *See Samsung LCD HDTV Sales Booming*, TVPredictions.com (Aug. 20, 2007), *available at* http://www.tvpredictions.com/samsung082007.htm.

Intel recently agreed to put the technology in its system-on-a-chip architecture.[5] Intel states that it "strongly supports OCAP as an important technology for the retail market,"[6] Samsung says "OCAP is the furthest-developed standard for CE device compatibility with interactive digital cable services,"[7] and MPAA notes that "the OpenCable Platform satisfies many content provider concerns by providing bidirectional devices with an industry-wide software platform that includes modern tools of interactive content delivery, presentation and protection, all of which can be exercised through marketplace negotiations."[8]

The OpenCable Platform is the *only* realistic solution for bringing two-way digital cable-ready devices to market before the 2008 holiday season (which the *Notice* establishes as an important goal). Panasonic says in this regard that it "expects that consumers will be able to purchase a fully interactive (two-way) digital cable-ready HDTV in advance of the FCC mandated date for the digital transition"[9] and that "the availability of OCAP-enabled TV receivers enable[s] access to the kind of programming and services in an integrated television that will excite consumers to make the switch to digital cable, and thereby assist[s] the national transition to digital broadcasting."[10]

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5 *See* NCTA Comments at 12.

6 Intel Comments at 5.

7 Samsung Comments at 2. The OpenCable Platform is incorporated into published specifications, approved by national and international standards bodies, cleared for intellectual property, and licensed to major CE manufacturers on fair and reasonable licensing terms. *See* Comcast Comments at 9; NCTA Comments at 15.

8 MPAA Comments at 24.

9 Panasonic Comments at 4. *See also* Samsung Comments at 2 ("Samsung has supported OCAP with substantial investments in research and product development in cooperation with cable operators and other electronics companies.").

10 Panasonic Comments at 7.

The cable industry is also stepping up to the plate in supporting the OpenCable Platform in its digital cable systems -- both to facilitate the introduction of two-way digital cable-ready devices at retail and to aid the cable business in other ways.[11] Consistent with timetable set forth in NCTA's reply comments filed today, Comcast is committed to complete the deployment of the OpenCable Platform in all its cable systems by the 2008 holiday season. Comcast also explains in its initial comments that it is incorporating the OpenCable Platform into its next generation of set-top boxes.[12] Time Warner Cable reports that, as of now, it has deployed OpenCable in more than two-thirds of its cable headends and already has placed more than 100,000 OpenCable set-top boxes in service.[13]

In light of these marketplace facts, Sony is simply wrong in claiming that the OpenCable Platform cannot be implemented in time for the broadcasters' digital transition.[14] CE manufacturers (other than Sony) and cable operators *are* making the investments in the OpenCable Platform *today*, and licenses and technical specifications *are* available *today* to build two-way digital cable-ready devices for the retail marketplace.[15] Sony also fails to note that *all*

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[11] *See* Comcast Comments at 10-11 (noting that use of the OpenCable Platform and other consistent feature sets across multiple vendor products will help lower equipment costs and further diversify Comcast's equipment supplier base); NCTA Comments at 8-13.

[12] *See* Comcast Comments at 10 (noting that RNG boxes will use the OpenCable Platform and other industry-accepted technologies).

[13] *See* TWC Comments at 24. As NCTA explains in its reply comments today, Comcast, Time Warner Cable, Cox, Cablevision, and Advance-Newhouse will have completed the rollout of OpenCable to headends in all of their systems by the 2008 holiday season. This commitment will cover over 91 million homes passed.

[14] *See* Sony Comments at 11.

[15] Sony's attempt to discredit the OpenCable Platform by noting that the specifications are "Issued" but not "Closed" is disingenuous, as detailed in the reply comments filed by NCTA today.

CE companies (including Sony) committed to using the OpenCable Platform for two-way digital cable-ready products in an agreement reached with the cable industry in 2002.[16]

III. THE DCR+ PROPOSAL WOULD HARM CONSUMERS AND SKEW MVPD COMPETITION AND MUST BE REJECTED BY THE COMMISSION.

A. The DCR+ Proposal Would Harm Consumers.

The Commission has said that a key goal of this rulemaking is to facilitate the availability of two-way digital cable-ready devices at retail by the 2008 holiday season.[17] As explained above, the OpenCable Platform can meet that objective. The DCR+ proposal clearly cannot. Even putting the best face on its proposal, CEA acknowledges in its latest set of proposed rules that it does not anticipate the relevant standards for DCR+ to be adopted until 2008.[18] CEA and CE companies have repeatedly told the Commission that it takes a minimum of 18 months to design and develop new products,[19] which means CEA cannot possibly expect that DCR+ products could come to market until mid-2009 *at the earliest*. And, of course, such a timetable

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[16] *See* Comcast Comments at 12 n.21 (citing prior CE industry commitments on OpenCable Platform). As noted, Comcast and other cable operators strongly support the development of OpenCable Platform-enabled devices. However, the DCR+ proposal would force the cable industry to divert resources away from the ongoing development of such products. Therefore, it might reasonably be suspected that Sony's chief motivation in objecting to the OpenCable Platform is to delay CE competitors, like Samsung, Panasonic, and LG Electronics, that have embraced the OpenCable Platform and are building products based on the OpenCable Platform standard.

[17] *See Notice* ¶ 14.

[18] *See*, *e.g.*, CEA Comments at App. A, "CEA's Proposed Draft Amendments to Regulations," §§ 15.38(b)(1)-(3), (5), (18). This is the third DCR+ proposal made by CEA since November 2005, and CEA continues to rely on "vaporware" to make its DCR+ products a reality. This reliance on non-existent standards would appear to conflict with Sony's statement in its comments that "[w]hen building a device to meet a non-static specification, the manufacturer carries the risk that future revisions to the specification render the device obsolete, or even non-functional." Sony Comments at 13. It is also worth pointing out that the Commission cannot incorporate by reference standards that do not even exist, as is contemplated by CEA's proposed set of rules. *See* 1 C.F.R. part 51 (establishing policy and procedures for incorporation by reference pursuant to 47 U.S.C. § 552(a)).

[19] *See* Comcast Comments at 13 n.28 (citing CEA and CE companies' statements to the Commission regarding the product development cycle).

would (to quote Sony) "require a major and unjustified leap of faith by the Commission"[20] given the substantial and complex standardization issues that would have to be overcome.[21]

Moreover, even if such standards could be developed in a timely fashion, there is no assurance that CE companies would actually build any DCR+ devices, or that retailers would carry them (particularly given the poor performance of one-way digital cable-ready devices at retail). Sony, for example, claims it is "committed to delivering to consumers the benefits of higher quality technology for cable navigation devices,"[22] but tellingly makes no actual commitments to build DCR+ devices. As Time Warner Cable recommends in its comments, to the extent the Commission imposes any new technology mandates on MVPDs in this proceeding, it should adopt corresponding requirements that CE manufacturers produce specified numbers of two-way products for retail.[23]

CEA's failure to make such commitments raises substantial doubts about the marketplace appeal of DCR+ products. The simple fact is that DCR+ would be a consumer disaster. Although DCR+ products would be able to access switched digital video, electronic program guide ("EPG") data, video-on-demand ("VOD"), and impulse pay-per-view, they would *not* be able to support any of the other interactive services that the cable industry is currently deploying or plans to deploy, including, just for starters, interactive advertising, Start Over™, Look Back,

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[20] Sony Comments at 11.

[21] *See* NCTA Comments at 39-41.

[22] Sony Comments at 2.

[23] *See* TWC Comments at 20. The point Time Warner Cable makes is clear -- any rules the Commission adopts would do little to further the goals of Section 629 if the Commission does not also require CE manufacturers to build compliant devices.

voting and polling, and Caller ID to the TV.[24] *DCR+ products would be obsolete from the very first, and would become even more so with every passing day.* Such limitations would inevitably disappoint and confuse cable customers, who would rightfully expect a "digital cable-ready" device to deliver more than just a subset of digital cable services.[25] Even the Home Networking Proponents (whose signatories include Sony) agree that any regulations must "address the cutting edge of digital technology development, not simply what might be viewed as traditional services or attachment models."[26]

Forcing cable operators to disaggregate their cable services would further add to consumer confusion. Under the DCR+ proposal, CE manufacturers would have the ability to deconstruct and repackage cable services, eliminating all traces of the underlying cable service provider, and rebranding those cable services as "their" product for viewing on devices they sell, regardless of how those cable services have been purchased by consumers or marketed and delivered by their cable operators. Consequently, a consumer who owned different models of DCR+ televisions would have *no* assurance that any two of them would deliver the same cable experience. As Comcast points out in its initial comments, such an outcome would be anti-consumer and contrary to the basic purpose of the navigation device statute (*i.e.*, facilitating the

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[24] *See* Comcast Comments at 24-25; NCTA Comments at 37; TWC Comments at 28.

[25] CEA makes no commitment in its proposed rules to provide honest disclosures to consumers regarding the limited functionality of DCR+ devices -- something that one of CEA's strongest supports, Public Knowledge, even supports. *See* Public Knowledge Comments at 5. Rather, in keeping with the other "buck-passing" elements of the DCR+ proposal, retailers and cable operators would be saddled with the responsibility of responding to the inevitable customer complaints about the limited capabilities of DCR+ products.

[26] Home Networking Proponents Comments at 10.

competitive availability of equipment to receive MVPD services).[27] Importantly, Microsoft (a signatory to the original DCR+ proposal) strongly opposes any disaggregation mandate.[28]

The DCR+ proposal would harm consumers in numerous other respects. As Comcast and others point out in their initial comments, the DCR+ proposal would jeopardize cable network security by, among other things, forcing cable operators to use content protection technologies that have not been properly vetted for use with cable content and that do not have the support of the studios and other content suppliers.[29] Consequently, hopes of acquiring early release windows for high-value content to cable customers would be thwarted, and some of cable's most appealing programming could migrate to other platforms that are not barred by government regulations from using appropriate content protection mechanisms.[30] It would be anomalous in the extreme if consumers who purchase bidirectional cable-ready equipment were

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[27] *See* Comcast Comments at 23-24; *see also* NCTA Comments at 36; TWC Comments at 29. AT&T emphasizes that Section 629 "authorizes the Commission only to work with industry to permit retail navigation devices to be developed" and that "Congress gave the Commission no power to regulate all of the features and designs of video services or consumer equipment." AT&T Comments at 2.

[28] *See* Microsoft Comments at 6 (reiterating that the Commission's rules "should not interfere with the ability of cable operators to aggregate content and to establish and control the 'basic look and feel' of [their] offering" (citations omitted)).

[29] *See* Comcast Comments at 20-21; NCTA Comments at 55-56; TWC Comments at 36. Public Knowledge does CEA one better by contending that the Commission lacks the authority to mandate that CE devices employ *any* content protection technologies. *See* Public Knowledge Comments at 4.

[30] MPAA notes the "Hobson's choice" that content producers would have to face: "release high value content…to insecure analog outputs through which unauthorized redigitization, distribution, and copying can take place…; or limit the nature of the content and services made available to MVPDs, thereby diminishing the full potential of bidirectional digital receivers." MPAA Comments at 9; *see also id.* at 2 ("Content owners simply cannot afford to make their valuable content available to consumers in formats that cannot ensure that the content is adequately protected against misuse."). Adopting requirements that jeopardize network security violates the prohibition in Section 629(b) of the navigation device statute. *See* 47 U.S.C. § 549(b); *see also infra* Section III.C. for further discussion of legal infirmities with DCR+ proposal.

to be foreclosed, by ill-considered regulations, from accessing high-value programming that may be made available on other MVPD platforms.

Another disqualifying consequence of the DCR+ proposal is that it would impede innovation in the cable industry to the detriment of cable operators and their customers. Comcast and other commenters have catalogued the numerous ways in which CEA would restrict innovation, such as by subjecting any changes in the OpenCable Platform to a Commission rulemaking, delaying the introduction of new interactive services until certain testing requirements are satisfied, and requiring prior Commission approval for cable operators to use switched digital video (which is critical to reclaiming bandwidth for more HD programming, faster broadband Internet, and other services consumers demand).[31] CEA now proposes in its latest set of proposed rules that 20 percent of digital cable customers be forced to take set-top boxes limited to DCR+ capabilities and be prevented from upgrading to more advanced set-top boxes.[32] CEA fails to explain how these innovation-killing requirements might serve the interests of consumers or are otherwise consistent with the congressional directive that the Commission "avoid actions which could have the effect of freezing or chilling the development of new technologies and services."[33]

It is also important to emphasize that the DCR+ proposal reflects yet another tortured attempt by CEA to redefine the scope and purpose of Section 629. For some time, CEA has maintained that the commercial availability goal of Section 629 required that cable companies be

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31 *See* Comcast Comments at 18-19; NCTA Comments at 45-46, TWC Comments at 32-33.

32 *See* CEA Comments at App. A, "CEA's Proposed Draft Amendments to Regulations," §76.641(c)(7).

33 S. Conf. Rep. No. 104-230 at 181 (1996).

forced to rely on the same separated conditional access technology through which CE devices can connect to cable systems. In filing after filing, CEA has insisted that *every* new digital set-top box deployed after the integration ban must use CableCards because otherwise there would not be common reliance and devices connected to the network could not be assured of working.[34] That requirement has been implemented -- causing hundreds of millions of dollars per year of unnecessary costs to cable companies and their customers.

CEA now proposes to redefine what common reliance means. The draft rules filed by CEA with its comments would require cable operators to deploy the existing CableCARD *and* a new CableCARD,[35] thereby making it impossible for cable set-top boxes to rely entirely on a single separated security technology (while adding yet more costs for cable set-top boxes and cable customers). But CEA's redefinition of common reliance does not stop there. Beyond these new CableCARD requirements, cable operators would be forced to commonly rely on a host of other technology solutions mandated by the CE and IT industries and be subjected to other innovation-killing requirements. Such proposals go far beyond what Congress intended in enacting in Section 629, what prior Commissions intended in implementing the statute, and how equipment regulations have been applied to other industries.[36]

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[34] CEA made this point time and again in opposing waiver requests filed by Comcast and dozens of other MVPDs. *See*, *e.g.*, CEA Comments, filed in CS Dkt. No. 97-80, CSR-7012-Z (June 15, 2006); CEA Comments, filed in CS Dkt. No. 97-80, CSR-7049-Z (Sept. 18, 2006); CEA Comments, filed in CS Dkt. No. 97-80, CSR-7112-Z (Mar. 12, 2007).

[35] *See* CEA Comments at App. A, "CEA's Proposed Draft Amendments to Regulations," §76.641(d).

[36] *See infra* Section III.D. for further discussion of the telephone equipment experience.

B. The DCR+ Proposal Would Harm MVPD Competition And Violate The Administrative Procedure Act By Arbitrarily Imposing Onerous Requirements On Cable Operators, But Not Their MVPD Competitors.

This rulemaking has devolved into the regulatory equivalent of a Middle Eastern bazaar where various companies peddle their wares to the Commission. First, CEA asks the Commission to impose a staggering array of requirements on the cable industry, forcing operators to redesign (at their own expense) every element of the cable plant, from headends and set-top boxes, to EPGs and VOD services, to CableCARDs.[37] Now other CE and IT companies have joined the fray, seeking the Commission's imprimatur for their respective technologies. Hitachi and other members of the Digital Living Network Alliance ("DLNA") urge the Commission to mandate the use of DLNA-compatible devices,[38] while the 1394 Trade Association asks the Commission to require the continued use of the 1394 interface on set-top boxes[39] and Intel requests that the 1394 interface be replaced with an IP interface protected by

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[37] As Comcast notes in its initial comments, the Multi-Stream CableCARD would have to be overhauled to include more memory and processing power. *See* Comcast Comments at 14-15. The additional processing power would result in higher energy usage (contrary to national policy) and increased heat (raising performance and possibly safety issues as well). CEA and other DCR+ supporters make no effort at all to grapple with these very real, practical issues.

[38] *See* Home Networking Proponents Comments at 10. The complaints that the DLNA members make regarding home-networking are without merit. As an initial matter, as Sony and other DLNA members are well aware, content providers insist on content protection measures that affect MVPD distribution of their content in the home environment. *See* MPAA Comments at 12 ("As long as content creators can ensure adequate protection of their programming, they want to provide consumers with additional flexibility, such as 'rental' or home networking rights . . ."). If Comcast and other MVPDs did not agree to these measures, their ability to obtain high-value programming content would be impaired. Moreover, with respect to the cable industry, CableLabs has approved a number of output protection technologies (including, most recently, DTCP-IP) that enable the use of a wide variety of networking solutions. *See* CableCARD Host Interface License Agreement, Compliance Rules, Exhibit C, § 2 (referencing approved digital output protection technologies for host devices), *available at* http://www.opencable.com/downloads/CHILA_New.pdf. Finally, it is inconsistent for DLNA to be advocating for marketplace innovation, on the one hand, while urging the Commission to mandate the use of its particular technology by cable operators, on the other.

[39] *See* 1394 Trade Association Comments at 2.

DTCP.[40] Nagravision asks the Commission to endorse its downloadable security solution, sight unseen,[41] and TiVo proposes the adoption of its Home Media Engine protocol (as a "compromise" solution).[42] In effect, the Commission is being asked to serve as the Chief Technology Officer for the entire cable industry, picking technology winners and losers regardless of the cable industry's views on any particular solution, or the commercial viability of or consumer demand for a particular device or concept.

Such centrally-planned industrial policy is universally panned by MVPD commenters, as well as Microsoft, and is contrary to longstanding Commission policy.[43] DirecTV, for example, underscores the harm to innovation that technology mandates would cause in the DBS industry.[44] AT&T emphasizes that "Section 629 does not make the Commission the arbiter of all disputes

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[40] *See* Intel Comments at 8.

[41] *See* Nagravision Comments at 6.

[42] *See* TiVo Comments at 26. ATIS and Microsoft tout their own solutions for MVPD networks. *See* ATIS Comments at 4-6 (detailing standards-setting activities for IPTV networks); Microsoft Comments at 12-13 (describing original equipment manufacturer adaptation kit).

[43] *See Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, Second Report and Order, 20 FCC Rcd. 6794 ¶ 30 (2005) ("It is not our intent to force cable operators to develop and deploy new products and services in tandem with consumer electronics manufacturers. Cable operators are free to innovate and introduce new products and services without regard to whether consumer electronics manufacturers are positioned to deploy substantially similar products and services."); *see also In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Fourth Report and Order, 16 FCC Rcd. 15435 ¶ 7 (2001) ("Indeed, we have previously recognized that, in adopting the 1996 Act, Congress consciously did not try to pick winners or losers, or favor one technology over another."); *In the Matter of Deployment of Wireline Services Offerings Advanced Telecommunications Capability*, Mem. Op. & Order & Notice of Proposed Rulemaking, 13 FCC Rcd. 24011 ¶ 2 (1998) ("The role of the Commission is not to pick winners or losers, or select the 'best' technology to meet consumer demand, but rather to ensure that the marketplace is conducive to investment, innovation, and meeting the needs of consumers.").

[44] *See* DirecTV Comments at 12 ("DIRECTV, for example, recently rolled out HD services (including HD local broadcast service) that are only made possible by the spectral efficiency of MPEG-4 compression. At the time, EchoStar was not yet using MPEG-4, and cable operators generally still do not use this technology. This surely would not have occurred had DIRECTV's set-top boxes been governed by the sort of intra-MVPD negotiations required under CEA's or NCTA's approaches. EchoStar and cable operators would have had every incentive to 'slow roll' incorporation of MPEG-4 technology into a plug-and-play navigation device in order to prevent DIRECTV from capitalizing on a competitive advantage.").

between MVPDs and consumer electronics manufacturers,"[45] and Verizon states that "the Commission should not dictate any particular technical standards for two-way plug-and-play[.]"[46] Microsoft also comes out strongly against technology mandates, noting that "[t]he Commission's role is not to pick the technology solution for creating bi-directional cable-ready devices" and adding that "[a]ny rules adopted in this proceeding should appropriately consider the rights of the network operator[s] to determine the composition of their service, and, subject to their willingness to make the necessary technologies available for license to device manufacturers, they should be free to select the technology they feel is most appropriate in their context."[47]

These concerns about Commission-imposed technology mandates apply equally to Comcast and other cable operators. The cable industry has embraced the OpenCable Platform because it will enable a workable two-way solution for retail devices in the near-term, and benefit cable's business by, among other things, facilitating the introduction of new interactive services on retail and leased devices.[48] DCR+, in contrast, will provide none of these benefits. Rather, it will retard innovation in the cable industry and harm cable customers, cable companies, content companies, and other participants in the cable business.

Given these substantial adverse effects, it would be irrational and unlawful for the Commission to impose the DCR+ or similar technology mandates just on cable operators,

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45 AT&T Comments at 2.

46 Verizon Comments at 2.

47 Microsoft Comments at 10.

48 *See* NCTA Comments at 8-13 (highlighting the key benefits of the OpenCable Platform technology).

especially when the OpenCable Platform is rapidly bringing CE compatibility to cable customers without regulation and without constraining the introduction and deployment of new services. It would also be arbitrary and capricious to saddle cable operators (or a subset thereof) with burdensome requirements that do not apply equally to their direct competitors, including the second and third largest MVPDs (DirecTV and EchoStar) and the Bell companies (AT&T, Verizon, and Qwest).[49] Any such discrimination would be in patent conflict with the Commission's oft-professed commitment to "technological and competitive neutrality."[50]

While the Commission has thus far gotten away with applying navigation device requirements to cable but not its chief MVPD competitors,[51] that does not mean that it can lawfully perpetuate -- much less exacerbate -- this discriminatory treatment. Any new rules that differentiate among direct MVPD competitors will need to be justified on the basis of the

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[49] *See Burlington N. & Santa Fe Ry. v. Surface Transp. Bd.*, 403 F.3d 771, 777 (D.C. Cir. 2005). All of these companies argue strenuously against imposing rules that would require them to reengineer their networks, as DCR+ would do for cable networks. *See* DirecTV Comments at 5; EchoStar Comments at 4; Verizon Comments at 13-14; AT&T Comments at 8; Qwest Comments at 5.

[50] *See, e.g., Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report & Order & Notice of Proposed Rulemaking, 20 FCC Rcd. 14853 ¶¶ 1, 3, 16 nn.44 & 45 (2005); *see also* Statement of Commissioner Kevin J. Martin, *In the Matter of IP-Enabled Services*, Notice of Proposed Rulemaking, 19 FCC Rcd. 4863 (2004) ("As we move forward, we must ensure that our policies treat similar services in a similar fashion and that we do not create a regulatory framework that promotes potential arbitrage opportunities.").

[51] DirecTV and EchoStar have been exempted from the integration ban, and Verizon and Qwest have received broad waivers from the ban. *See* Comcast Comments at 19. AT&T claims in its comments that its U-verse network "is much closer to achieving Congress' goals in Section 629 than digital cable systems," AT&T at 5, notwithstanding the facts that AT&T *is* a digital cable system, that there are no navigation devices at retail today that will work on AT&T's systems without a set-top box, and that no such devices are likely to come to market anytime soon. *See id.* at 11-12. Moreover, AT&T has not sought a waiver of the integration ban (in contrast to Verizon and Qwest). AT&T notes in its comments that it is working with Microsoft on an OEM Adaptation Kit ("OAK") that would support third-party devices, *see id.* at 12, but as Microsoft explains its in its comments, OAK is essentially a proprietary Microsoft solution requiring third-party "set-top box manufacturers [to] license from Microsoft the necessary software products, documentation, processes, development and testing tools, network environment, porting kits, build environment, technical support and training." Microsoft Comments at 13. Although Comcast certainly supports the ability of AT&T to determine what technology gets deployed in its networks, AT&T has not explained how this solution would comply with the navigation device rules.

marketplace realities of 2007, not 1996 (when Section 629 was enacted) or 1998 (when the Commission adopted the integration ban). Among the changed circumstances that the Commission will be required to take into account are the robust growth of multichannel video competition,[52] with DBS now having nearly 30 million subscribers and the giant Bell companies coming on strong,[53] as well as the ways in which DBS providers have reduced their support for independent CE devices even as cable operators have vastly expanded theirs.[54]

Above and beyond the foregoing, there is an additional reason why the Commission has no business adding to the burdens it imposes on the cable industry under the authority of Section 629: the Commission first has a duty to clean up the mess that has already been made of the Commission's integration ban. Comcast has explained elsewhere in this docket the arbitrary and capricious nature of the Commission's waiver policies with respect to the integration ban.[55]

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[52] More than three and a half years ago, the Commission explicitly recognized that "the vast majority of Americans enjoy more choice, more programming and more services than any time in history." *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Tenth Annual Report, 19 FCC Rcd. 1606 ¶ 4 (2004). That is all the more true today.

[53] Verizon now serves 515,000 video customers and already ranks as the 11th largest cable operator in the U.S. today. *See* Verizon News Release, *Verizon Posts Strong 2Q 2007 Results Highlighted by Gains in Earnings, Consolidated Margins and Cash Flows*, *available at* http://newscenter.verizon.com/press-releases/verizon/2007/verizon-posts-strong-2q-2007.html (July 30, 2007) (noting that that FiOS TV is adding 2,600 customers per day). AT&T recently reported that it now has over 100,000 subscribers to its U-verse service. *See* Todd Spangler, *AT&T: U-verse TV Subs Top 100K*, Multichannel News (Sept. 5, 2007), *available at* http://www.multichannel.com/article/CA6475235.html.

[54] The inescapable truth is that the consumer equipment options available to cable customers far surpass those now available to DBS customers and most telco video customers, *see* Comcast Comments at 8 n.13, and the introduction of OpenCable Platform-enabled devices will further widen that gap. DirecTV and EchoStar sell or lease set-top boxes whose program guide, on-demand functions, outputs, conditional access, middleware, and other proprietary features are determined exclusively by DirecTV and EchoStar. *See* DirecTV Comments at 8-9 (detailing proprietary features of DirecTV navigation devices); EchoStar Comments at 4 ("the very nature of DBS service requires proprietary equipment to communicate with the subscriber's satellite dish"). OpenCable Platform-enabled devices, in contrast, give CE manufacturers much more flexibility to include features in such devices beyond just cable applications. *See* NCTA Comments at 17.

[55] *See* Comcast *Ex Parte*, filed in CS Dkt. No-97-80, CSR-7012-Z (July 3, 2007) (highlighting arbitrariness of the integration ban waiver orders).

Against this backdrop, it would be utterly indefensible for the Commission to adopt additional burdensome regulations for cable companies (or, worse, for a disfavored subset of cable companies).

C. The Commission Cannot Adopt The DCR+ Proposal Consistent With The Communications Act Or The Constitution.

The record is clear that the Commission does not have the authority to force cable operators to implement the DCR+ proposal. The DCR+ proposal would violate federal communications statutes and the Constitution.

First, the DCR+ proposal conflicts with numerous statutory provisions. Among other things:

- The DCR+ proposal goes well beyond the limited equipment-related objectives of Section 629 (*i.e.*, giving consumers the ability to obtain navigation device equipment at retail that can be used to receive services by an MVPD).[56] The statute certainly does not give the Commission authority to impose draconian, innovation-killing requirements on established cable operators but not their MVPD competitors.

- Section 629(b) directs the Commission not to prescribe regulations that jeopardize the security of services provided over multichannel video programming systems.[57] As explained above, the DCR+ proposal would have precisely that effect.

- The DCR+ proposal is contrary to the congressional directives in Section 624A that the Commission adopt minimal technical standards regarding equipment compatibility and rely instead on the marketplace.[58]

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[56] *See* 47 U.S.C. § 549(a); *see also id.* § 549(c) (establishing waiver policy under which waivers granted shall be effective "for all providers of services and products"); *see also* Comcast Comments at 16-17; NCTA Comments at 67-68; TWC Comments at 37-38.

[57] *See* 47 U.S.C. § 549(b); *see also* Comcast Comments at 20-21; NCTA Comments at 69.

[58] *See* 47 U.S.C. § 544a; *see also* Comcast Comments at 17; NCTA Comments at 70; TWC Comments at 38.

- The DCR+ proposal would violate Section 7(a) of the Communications Act by hindering cable operators from providing new technologies or services to the American public.[59]

- The DCR+ proposal would violate Section 706 of the Telecommunications Act of 1996 by complicating and delaying the development and deployment of broadband services by cable operators, including the offering of advanced telecommunications capabilities.[60]

Second, adoption of the DCR+ proposal would violate the First and Fifth Amendments of the Constitution. As Time Warner explains,[61] the DCR+ proposal would violate the First Amendment by interfering with the ability of cable operators to deliver content to their subscribers, even though cable operators undeniably are entitled to First Amendment freedoms of speech and of the press,[62] and the requirement that cable provide a free pathway for the delivery of software upgrades to CE products would be a physical occupancy of private cable property that violates the Fifth Amendment.[63] In addition, adoption of DCR+ as a regulatory regime would so interfere with cable operators' business plans and their reasonable investment-backed expectations that it would constitute an unlawful Fifth Amendment regulatory taking.[64]

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59 *See* 47 U.S.C. § 157(a).

60 *See* Telecommunications Act of 1996, § 706.

61 *See* TWC Comments at 39-40.

62 *See Turner Broad. Sys. v. FCC*, 512 U.S. 622, 636 (1994).

63 *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982) (holding that a "permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve").

64 *See Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978); *see also Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005).

D. The Commission's *Carterfone* Decision, Part 68 Equipment Registration Program, and *700 MHz Order* Do Not Support The Adoption Of DCR+ Rules.

Multiple first-round commenters attempt to justify their regulatory proposals by invoking analogies to the Commission's *Carterfone* decision and the Part 68 registration program.[65] Some also allude to the "open access" rules the Commission adopted for a portion of the 700 MHz spectrum.[66] The discussions of these matters in the comments reflect a startling level of ignorance.

Carterfone, decided in 1968, merely determined that a subscriber to telephone service was entitled to use the telephone network in ways that were "privately beneficial without being publicly detrimental."[67] It took several additional years for the Commission to determine that this principle should be implemented by prescribing technical standards under which customer premises equipment could be "registered" for connection to the public switched telephone network, and it took several more years -- including many day-long meetings with scores of engineers -- to ultimately write the necessary rules.[68] CPE competition began in earnest only after the Bell System was broken up in 1984 -- 16 years after *Carterfone*. Over time, Part 68 came to occupy scores of fine-print pages of Title 47 of the Code of Federal Regulations.[69]

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[65] *See*, *e.g.*, Sony Comments at 6; TiVo Comments at 9.

[66] *See*, *e.g.*, Sony Comments at 7 n.23; TiVo Comments at 10.

[67] *Use of the Carterfone Device in Message Toll Telephone Service*, 13 FCC 2d 420, 423 (1968). *Carterfone* reaffirmed what the D.C. Circuit had said 12 years earlier. *See Hush-A-Phone Corp. v. U.S.*, 238 F.2d 266 (D.C. Cir. 1956).

[68] *See* Commission Docket Numbers 19528, 20774, 79-143, and 81-216.

[69] Ultimately, the Commission delegated much of its authority to private standards bodies *See In the Matter of 2000 Biennial Regulatory Review of Part 68 of the Commission's Rules and Regulations*, Report & Order, 15 FCC Rcd. 24944 (2000).

The Part 68 experience demonstrates that it is extremely difficult and time-consuming to craft appropriate technical standards that are enshrined in rules. But in many other ways, what is important about Part 68 is how it does *not* serve as an appropriate basis for decisions about equipment compatibility with cable networks. The Commission has already recognized this.[70] But given the confusion shown by some of the commenters, a fuller explanation may be helpful.

- *Monopoly Versus Competition*. Part 68 was developed in an environment in which the Bell System had a huge and powerful service monopoly, spanning local and long-distance telephone services and both central office and customer-premises equipment. By contrast, all of the services offered today by cable companies (video, Internet, and voice) are subject to vigorous competition.

- *Affiliated Manufacturer Versus Unaffiliated Manufacturers*. The Bell System consisted not only of operating companies but also of an affiliated manufacturer (Western Electric) that was routinely favored to such an extent that virtually no other supplier's equipment could be used in or connected to the network. By contrast, cable companies do not have affiliated manufacturers, and they have facilitated the connection of myriad devices to their networks. Today, 440 different models of cable modems have been certified for connection to cable Internet services,[71] and over 568 digital cable-ready devices have been certified or verified for use with CableCARDs in Comcast and other cable systems.[72]

- *Industry Standards*. The telephone industry was heavily standardized; even independent telephone companies generally conformed to "Bell System Practices." At the time Part 68 was created, the technical characteristics of the

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[70] The Commission said in its 1998 navigation device order that the parallels to *Carterfone* have "limitations." *See In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, Report and Order, 13 FCC Rcd. 14775 ¶ 12 (1998) ("When customer ownership of telephone CPE became available, the telephone network was effectively a national monopoly. Well developed technical standards existed throughout an almost ubiquitous network. CPE compatible with the telephone network was part of this environment. In contrast, cable networks do not reflect universal attributes, and have substantially different designs. Nor do satellite systems share commonality beyond the most basic elements. Additionally, as Section 629 recognizes, preventing interference to other network users and maintaining the integrity of the system signal is of greater concern for video delivery systems than for telephone systems."); *see also id.* ¶ 39 ("the telephone networks do not provide a proper analogy to the issues in this proceeding due to the numerous differences in technology between Part 68 telephone networks and MVPD networks").

[71] *See* CableLabs: Certification and Qualification, *at* http://www.cablelabs.com/certqual/lists/certqual_ie.html.

[72] *See* NCTA CableCARD Report, filed in CS Dkt. No. 97-80, at 1 (June 25, 2007).

telephone network had been stable for approximately a century, and even today significant parts of it remain largely unchanged. By contrast, the cable industry was built by a variety of entrepreneurs using equipment from a multiplicity of suppliers, so technical characteristics still vary considerably from system to system. Cable evolved rapidly from a one-way, one-service analog medium to a two-way, multi-service, increasingly digital medium. Cable plant and cable services are evolving every day, with more HD channels, more VOD, better EPGs, faster Internet, more digital voice, switched digital, Start Over™, Look Back, and other innovations.

- *Transmission Versus Content*. Part 68 was designed to cover a service that offered nothing but a pure transmission path. All content was supplied by the calling and called parties. By contrast, cable companies are in the business of delivering valuable content to consumers. They need to be able to obtain access to the programming that consumers want and then to deliver it to them in a way that is consistent with consumer expectations.

- *Dedicated Versus Shared Transmission Facilities*. In telephony, each customer is connected to the network by a transmission pathway dedicated to a single user, generally all the way from the customer's premises to the telco's central office. In fact, Part 68 does not even apply when the network is shared ("party line" service).[73] Also, the telephone could be used for only one call at a time. In cable, the network is shared among multiple households, and multiple consumers commonly use multiple services at the same time. The use of shared transmission facilities greatly increases the risk of interference and disruption.

- *Single Service Versus Multiple Services*. Telephone consumers generally consume a single service -- "plain old telephone service" -- which consists of the ability to place and receive telephone calls (for economic reasons, "long distance" calls were billed differently than local calls, but the essential capability of each line was the same). In contrast, cable involves a growing variety of services. There are multiple tiers and other options for video services, with different consumers receiving different channel line-ups. Cable operators also provide VOD, growing levels of interactivity, high-speed Internet, IP phone services, and more, all on a single line.

- *Potential for Harms*. In the telephone context, the potential "harms to the network" were limited to certain enumerated electrical characteristics, such as hazardous voltages and longitudinal imbalance. In the cable context, a user can not only cause electrical harm but can jeopardize the quality -- or the privacy -- of a neighbor's communications.

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[73] *See* 47 C.F.R. § 68.2(a).

- *Content Protection Issues*. In the telephone context, theft of service is not a potential issue. "Dial tone" can be turned off for any given premises from the telco central office, and in any event the telco supplies only a conduit, not associated content. With cable's video services, theft of service has long been a major industry problem. Unlike with telephony, cable operators face a business imperative (as well as contractual obligations) to protect high-value content. The MPAA has made it plain that, if cable cannot protect high-value content, that content will migrate to other platforms that do.

Two additional points are important to understand about Part 68. First, at no time did Part 68 require telcos to deconstruct their equipment and place one important functionality in one device while requiring that other functions be performed only in a separate device (in contrast to the "separate security" requirement that has been imposed on cable set-top boxes). Under Part 68, all equipment functions (except the passive connector function performed by standardized jacks) can be performed in a single integrated device.

Second, unlike CEA's proposals here, CPE manufacturers did not use Part 68 to hijack control of telephone network design or service innovation. Part 68 did not give independent manufacturers and retailers any ability to dictate the design or characteristics of telcos' services, nor did it empower them to prevent service providers from introducing new services without first developing a new protocol that must be passed through an industry standards body. Rather, the Commission left it to telcos to design their own services in whatever manner they chose, a right that CE interests brazenly ask the Commission to take away from cable operators.

Analogies to the Commission's recent auction rules regarding a portion of the 700 MHz spectrum[74] are similarly inapt. First, the "open access" rules will not apply to most of the

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[74] *See In the Matter of Service Rules for the 698-746, 747-762 and 777-792 MHz Bands*, Second Report and Order, WT Dkt. No. 06-150, FCC 07-132 (rel. Aug. 10, 2007) ("*700 MHz Order*").

spectrum that is being auctioned; they only apply to 22 MHz of the 62 MHz that are up for auction.[75] Second, the "open access" rules place a great deal less of a burden on the C Block winner than CEA is proposing to saddle cable with here. For example, "[w]ireless providers are not required to permit attachment of any device or application that would interfere with the provider's obligations to comply with applicable regulatory requirements," such as CALEA and E911 requirements.[76] More fundamentally, the 700 MHz rules contain no requirements that CE manufacturers be given a role in establishing the characteristics of network services or network interfaces, nor do they contain any requirements that service providers refrain from introducing new services or that service providers disaggregate packages of content services for which they have freely negotiated. Third, the 700 MHz rules are being applied only to a party that is being informed *in advance* of these rules *before* it makes any investment and voluntarily chooses to accept these rules as a condition of its acquisition of a slice of the public's airwaves.[77] That is a dramatically different situation from the present one, where companies that have not invested a penny in the construction of cable systems want to impose all manner of burdens -- *after* the fact -- on companies that have invested over $110 billion in private risk capital simply to upgrade the systems they had previously built, also with private capital. Cable operators made these investments knowing that certain obligations would apply (*e.g.*, payment of franchise fees,

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[75] *See id.* ¶ 204.

[76] *Id.* ¶ 216.

[77] The Commission's decision to impose a reserve price on the blocks of spectrum licenses being auctioned expressly acknowledged the prospect that the "open access" service rules it adopted may reduce the price bidders are willing to pay for the spectrum. *See id.* ¶ 301. The Commission concluded that, "in the event that auction results for conditioned Upper 700 MHz C Block licenses do not satisfy the aggregate reserve price for the C Block, [it] will offer as soon as possible licenses for the C Block without the open platform conditions." *See id.* ¶ 311.

carriage of PEG channels), but they did *not* agree to the enormous burdens that CEA and its allies are proposing.

IV. TO BUILD A TRUE NATIONAL RETAIL MARKETPLACE FOR CE EQUIPMENT, THE COMMISSION SHOULD PURSUE AN ALL-MVPD SOLUTION.

As Comcast explained in its initial comments, it is willing to cooperate in the development and deployment of a two-way solution that can work across multiple MVPD platforms, if cable operators and their customers are not saddled with discriminatory new burdens.[78] Given that 30 percent of consumers obtain service from an MVPD other than cable, and that the applicable statute applies to all MVPDs,[79] it is increasingly anomalous to try to promote the "commercial availability of navigation devices" by adopting rules that apply only to cable. An "all MVPD-ready" solution could address these concerns.[80]

Comcast is pleased that numerous commenters, including competing MVPDs, CE manufacturers, IT companies, and others, expressed support for exploring such an "all MVPD-ready" solution, as well.[81] Comcast is prepared to work with these various parties to move the

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[78] *See* Comcast Comments at 13-14.

[79] The navigation device statute applies to all MVPDs, not merely existing cable operators, and should not be read to apply to a limited subset of competitors, in contrast to how the integration ban has been administered.

[80] *See* NCTA Comments at 72-74; *see also* TWC Comments at 13-16. Contrary to the concerns expressed in the Verizon and DirecTV comments, *see* Verizon Comments at 8, DirecTV Comments at 5, an all-MVPD solution is aimed at accommodating the unique designs of different MVPD platforms and connecting to CE devices via a common interface.

[81] *See*, *e.g.*, EchoStar Comments at 5-7; CEA Comments at 16; TiVo Comments at 27-28; Home Networking Proponents Comments at 14-15; Intel Comments at 12. Comcast takes no position here on whether the standards being pursued by ATIS would -- if adopted and implemented -- provide a solution that complies with the Commission's navigation device rules. *See* ATIS Comments at 4-6; *see also* Verizon Comments at 5-8; AT&T Comments at 11. Comcast does not actively participate in ATIS' standard-setting activities. However, Comcast understands that ATIS, which is dominated by the telephone industry, is focused on solutions for IP-based networks, not traditional cable networks, so its activities could not provide a basis for an "all MVPD-ready" solution.

"all MVPD-ready" concept forward, provided that the Commission does not force onto cable companies and their customers the massive disruption, expense, unfair burdens, and other adverse consequences of the DCR+ proposal.

V. CONCLUSION

In light of the foregoing and Comcast's initial comments, Comcast respectfully asks that the Commission endorse the OpenCable Platform, reject the DCR+ proposal, and help facilitate the development of an "all MVPD-ready" solution.

Respectfully submitted,

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